DOCKET FILE COPY ORIGINAL

EX PARTE OR LATE FILED

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

MARKET SQUARE WEST
801 PENNSYLVANIA AVENUE, N.W., SUITE 600
WASHINGTON, D.C. 20004-2615
TELEPHONE (202) 783-8400 • FACSIMILE (202) 783-4211

KANSAS CITY, MISSOURI
OVERLAND PARK, KANSAS
HOUSTON, TEXAS
LONDON, ENGLAND
ZURICH, SWITZERLAND

Rodney L. Joyce
(202) 624-1536

May 28, 1998

Magalie Salas, Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: CC Dkt. No. 97-211 (Ex Parte Filing)

Dear Ms. Salas:

I write at the invitation of Commission staff in order to provide the views of a large corporate telecommunications manager coalition on the application by MCI and WorldCom to merge their companies.[1] While the agency has received written comments on the proposed merger from a wide variety of interested parties -- including groups representing the interests of residential users of telecommunications service -- it has not yet heard from large business customers.

If approved without condition, the proposed merger would harm competition in the large business market by increasing the concentration of suppliers to that market as shown below. If the agency approves the merger, therefore, it should help overcome this harm by taking two specific actions described below that are designed to re-energize competition.

ARGUMENT

Commission policy permits approval of an application for merger of two competing telecommunications carriers only if the applicants prove that the "harms to competition [in telecommunications services] . . . are outweighed by the benefits."[2] With regard to harm, the agency has held that it will determine separately the extent to which the proposed merger would harm competition in each of three distinct product markets: (i) residential and small business services,

---

1. The coalition consists of the following participants: John P. Viher, Manager Communications Services, Bridgestone/Firestone, Inc.; and Roman W. Paras, Project Coordinator-Telecommunications, Alcan Aluminum Corp.

2. NYNEX Corp. and Bell Atlantic Corp., 12 FCC Rcd. 19985, 19987 (1997).

No. of Copies rec'd 024
List A B C D E

(ii) medium-sized business services, and (iii) large business and government services.[3] Our analysis is limited to the proposed merger's impact on the large business/government market.

I. The MCI/WorldCom Merger Would Dramatically Increase Concentration of Supply to the Large Business Market

While there are hundreds of long distance carriers, only the four largest -- AT&T, MCI, Sprint, and WorldCom -- serve large businesses since these four carriers alone provide the highly specialized services that large businesses often demand. For example, businesses with large employee concentrations in several discrete geographic areas often want virtual private network ("VPN") service. VPN is a highly specialized service that permits employees of a company to use the company's central computer resources in a way that is less expensive and more secure than otherwise may be possible.[4] Carriers other than the big four typically do not provide VPN service. For example, the interstate tariffs of Excel and Frontier -- both of which claim to be the fifth largest long distance carrier -- contain no VPN offering.[5]

Likewise, the big four carriers alone routinely provide the specialized 800 service functionality that many large businesses demand. For example, national retailers (like the major commercial airlines and large mail order merchants) often demand different geographic or time-of-day routing of incoming 800 calls in order efficiently to manage call center traffic. Many also require ANI reporting in order to facilitate future marketing or advertising campaigns or for other reasons. Companies who use 800 service to handle a large number and variety of customer service calls (such as computer hardware or software companies) often want interactive voice response

---

3. Id., 12 FCC Rcd. at 20016.

4. At least three types of cost savings may be possible with a typical VPN service configuration: (i) it may allow company employees to access company resources via a local connection to the Internet rather than by a long distance connection to the company's computer system; (ii) it may permit the company to replace some dedicated local access lines with less expensive Internet access lines; and (iii) it may permit the company to reduce operational costs by turning over responsibility for operating certain equipment (e.g., modem pools, ISDN terminal adapters, and remote access servers) to the VPN service provider. VPN service also provides security features (e.g., encryption, authentication, and tunneling) that may not otherwise be readily available to the VPN customer.

5. See Frontier Companies, Tariff F.C.C. No. 2; Excel Tariff F.C.C. No. 5.

functionality in order efficiently to direct incoming calls to the appropriate service representative. While such specialized features are available from the four largest carriers, the tariffs of second tier carriers do not mention them.[6]

The fact that carriers other than the big four provide their biggest volume discounts at usage levels far below those of many large businesses likewise suggests that these smaller carriers do not serve the large business market. For example, Excel apparently provides its biggest volume discount on MTS service to a customer spending just $5,000 per month, and Frontier apparently gives its biggest volume discount on MTS service to a customer spending just $20,000 per month, even though large businesses typically spend far more each month on MTS service.[7]

Public statements by mid-sized long distance carriers themselves confirm that the largest four carriers alone serve the big business market. For example, Excel takes pride in the fact that it has captured a "significant share of the residential market"[8] and notes that its customer base now consists of "approximately 6 million residential and small business long distance subscribers."[9] Frontier likewise describes itself as providing long distance services "primarily [to] small and mid-size business customers and targeted consumer markets" rather than to large business customers.[10]

It is not surprising that only the four biggest carriers serve the large business market since smaller carriers are technologically incapable of satisfying the special demands of large businesses for network reliability and consolidated network operational control. With regard to reliability, carriers smaller than the big four do not have the technological capability to satisfy this demand due to the regional nature of their networks. Fiber transmission networks typically are constructed as bi-directional rings in order to prevent disruption in the event of a fiber break, but the fiber rings of

---

6. LCI states that it will make available some specialized features to 800 service customers but only "when the technical capability exists" to do so. See, e.g., LCI Tariff F.C.C. No. 2, §2.26 (EasyLine 800), §2.27 (MacroLine 800), §2.33 (Nationwide 800).

7. Excel Tariff F.C.C. No. 5, §4.1 (Premier Dial One Commercial Service); Frontier Tariff F.C.C. No. 2, §2.2.1 and §3.2 (Maxcess I).

8. http://www.excel.com/coinfo/corpsumm.htm

9. http://www.excel.com/coinfo/cust.htm

10. Annual Report for Fiscal Year Ending December 31, 1997, Form 10-K, Part I, Item I, Business.

all but the four largest carriers lack sufficient geographic breadth to cover all population centers. Instead, these smaller carriers typically obtain nationwide coverage by deploying spurs that connect their fiber rings with outlaying population centers. Networks with numerous spurs inherently are less reliable than networks with fewer spurs since they are more vulnerable to outages than networks with fewer spurs and more bi-directional rings.

Large business customers likewise demand centralized network operational control far more frequently than others, and only the four largest carriers can reasonably claim to satisfy this need since smaller carriers necessarily must rely on other carriers (often several other carriers) to operate and manage much of the transmission and switching equipment they need in order to provide nationwide coverage. A nationwide network whose pieces are operated and managed by several different carriers inherently is less operationally efficient than a nationwide network controlled by a single carrier.

Since the big business market is served almost exclusively by the four largest carriers, concentration in this market would increase dramatically if MCI and WorldCom merge. While we are unaware of publicly available data showing carrier market shares in the large business market, we believe they may be roughly as follows: AT&T (40%), MCI (30%), Sprint (15%) and WorldCom (15%). These estimates are consistent with published FCC data (a) showing carrier market shares in the residential market and in all three product markets combined and (b) making plain that AT&T has a substantially smaller share (and that MCI, Sprint, and WorldCom have a substantially larger share) of the large business market than of the other two markets.[11] For example, while more than 63 percent of all local telephone access lines are presubscribed to AT&T's long distance service, AT&T has less than 48 percent of all long distance revenue. This shows that a disproportionate percentage of AT&T's customers are in the residential and small and mid-sized business markets since customers in those markets typically are lower volume users than are customers in the large business market. The above market share estimates for the big business market also appear to be consistent with GTE's analysis.[12] If market share data in the big business market are along the lines we have estimated, the merger could increase concentration in that market by 890 points as measured by the Hirschman-Herfindahl Index ("HHI"). As a matter of law, an increase of 890 points in the HHI creates a very strong presumption that a merger is likely to enhance market power and that it thus is contrary to the public interest.[13]

---

11. **Interexchange Carrier Market Shares**

Carrier	Share of IXC Revenues	Share of Presubscribed Lines	Share of Residential Lines
AT&T	47.9	63.3	69.9
MCI	20	14.5	13.7
Sprint	9.7	7.4	5.0
WorldCom	5.5	2.7	unknown
Excel	1.9*	2.4*	unknown
Frontier	1.9	1.3	unknown
LCI	1.9**	1.6**	unknown
All Others	11.2	6.8	11.4

* **Includes Telco**
** **Includes U.S. Long Distance**

12. See GTE's Pet to Deny at 13-14 (Jan. 5, 1998) ("when combined, MCI's and WorldCom's market share...[in the large business market] may well exceed that of AT&T").

13. See Dept. of Justice and Fed. Trade Comm'n Horiz. Merger Guidelines at 30 (Ap. 2, 1992).

II. If the Commission Approves the Merger, It Should Minimize Harm by Conditioning Its Approval in the Two Ways Described Below

While the public interest would justify denial of this application due to the dramatic increase in concentration that would result in service to the large user market, FCC policy alternatively permits approval subject to conditions designed to ensure that the benefits exceed this harm.[14] Under this standard, benefits might exceed harm if the agency took the following two steps to counterbalance harm. First, since only the top three post-merger carriers would possess the specialized network elements necessary fully to serve the large business market, the agency should require that these three companies afford all other carriers access to those elements on reasonable terms so that all carriers have an opportunity to provide the sophisticated services necessary to serve large businesses. While such resale competition is not an adequate substitute for facilities-based competition, it is better than leaving the large business market to be served by the big three carriers alone.[15]

Second, the Commission should facilitate Bell company entry into the long distance market since doing so should counterbalance increased concentration by stimulating competition in all segments of the long distance market.[16] The agency can facilitate Bell company entry by making clear that a Bell company application to provide long distance service in a state will be granted if the Bell company's exchange market is open to competition in the ways set for in the 14-point statutory checklist. Unfortunately, the Commission implied in its order denying Ameritech's application to provide long distance service in Michigan that it might deny a Bell company's application to provide long distance service unless the Bell company has opened its exchange market in certain unspecified

---

14. See n.2, supra.

15. It is especially important that the FCC take steps to ensure that these three carriers provide competitors with access to the network elements necessary to provide sophisticated services to large businesses given that these carriers apparently have quit voluntarily providing many such resale opportunities. See, e.g., MCI Commun. Corp., 10-K at 56 (April 15, 1998) (noting that MCI "de-emphasized its wholesale carrier business" in 1997).

16. A coalition of large corporate telecommunications service users already has explained why active Bell company provision long distance service should have substantial pro-competitive benefits. See "Comments of Ad Hoc Coalition of Corp. Telecommun. Service Managers et al." (CC Dkt. No. 97-231, Nov. 25, 1997) (explaining why long distance competition in Louisiana would be stimulated if Bell South's application to provide long distance service there were granted).

ways that go beyond those set forth in the 14-point checklist.[17] The Commission should make clear that this dicta in the Ameritech order -- which was released before four of the five incumbent commissioners joined the agency -- is not Commission policy.

CONCLUSION

In order to counterbalance the increased concentration in the large business market that would result from the proposed merger, the Commission should authorize the merger only if it does so subject to (i) mandatory resale opportunities and (ii) clarification that it will grant Bell company applications to provide long distance service upon compliance with the 14-point statutory checklist.

Respectfully submitted,

Rodney L. Joyce
Counsel for Ad Hoc Coalition of
Corporate Telecommunications
Service Managers

cc/ Michelle Carey (FCC)
Bill Bailey (FCC)

17. Applic. of Ameritech Michigan, 12 FCC Rcd. 20543, 20747-48 (1997).